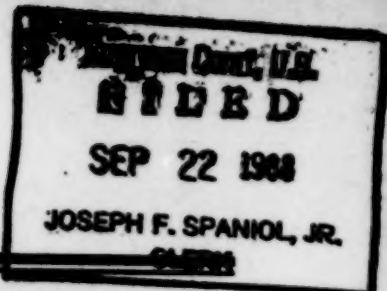


(6)

No. 87-1729



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**In the Supreme Court of the United States**

OCTOBER TERM, 1988

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**CAPLIN & DRYSDALE, CHARTERED, PETITIONER**

**v.**

**UNITED STATES OF AMERICA**

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**ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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**SUPPLEMENTAL BRIEF FOR THE UNITED STATES**

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Pursuant to Rule 22.6 of the Rules of this Court, the Solicitor General files this supplemental brief to call the Court's attention to two decisions of other courts of appeals that address issues closely related to those presented by the petition for a writ of certiorari in this case. In our brief in opposition to the certiorari petition, which was filed on June 9, 1988, we urged the Court to deny the petition, primarily because there was no firm conflict among the circuits on the statutory and constitutional issues presented. See Br. in Opp. 8-9. Since that time, however, the Second Circuit, sitting en banc, has rendered its sharply divided decision in *United States v. Monsanto*, No. 87-1397 (July 1, 1988), and a panel of the Eighth Circuit has rendered a decision in *United States v. Unit No. 7 & Unit No. 8 of Shop in the Grove Condominium, etc. (Kiser)*, No. 87-2499 (Aug. 5, 1988), petition for rehearing en banc pending (filed Sept. 16, 1988). On September 14,



1988, we filed a petition for a writ of certiorari to review the judgment of the en banc Second Circuit in the first of these cases. *United States v. Monsanto*, petition for cert. pending, No. 88-454. We believe that in light of the decisions in *Monsanto* and *Kiser*, the Court should grant certiorari in the present case as well.

1. The en banc Second Circuit held in *Monsanto*: (i) that a pretrial restraining order that has the effect of preventing the defendant from retaining counsel of his choice must be vacated or modified to the extent necessary to permit the defendant to pay legitimate (*i.e.*, non-sham) attorney's fees, and (ii) that any fees actually paid to an attorney will thereafter be exempt from forfeiture under 21 U.S.C. (Supp. IV) 853(c), even if the defendant is subsequently convicted and the jury returns a special verdict finding that the assets were the proceeds of his illegal drug activities. The en banc court's disposition was set forth in a brief per curiam opinion (*Monsanto*, slip op. 4743-4746), which was followed by eight separate opinions concurring in or dissenting from that disposition.

Eight of the twelve judges on the en banc court voted to vacate the restraining order, but they were divided on their reasons for doing so. Three judges concluded that Section 853 does provide for the forfeiture of assets that the defendant wishes to use to pay his attorney, but that the statute is unconstitutional under the Sixth Amendment to the extent it does so. *Monsanto*, slip op. 4746-4750 (opinion of Feinberg, C.J.).<sup>1</sup> Three other judges declined to reach the Sixth Amendment issue, because they concluded

<sup>1</sup> All citations are to the amended opinion of the en banc court of appeals. The amended opinion only changed the order of the separate opinions concurring in or dissenting from the court's per curiam opinion; the content of the separate opinions, as originally issued on July 1, 1988, was not amended.

that the statutory provision authorizing the issuance of a pretrial restraining order, 21 U.S.C. (Supp. IV) 853(e)(1), should be construed to exempt all "ordinary" expenditures (including those for attorney's fees), and that assets actually transferred to an attorney as payment of attorney's fees must thereafter be exempt from forfeiture under 21 U.S.C. (Supp. IV) 853(c). *Monsanto*, slip op. 4753-4766 (opinion of Winter, J.). The two remaining judges in the majority concluded that Section 853 does not exempt assets used to pay attorney's fees and that application of the statute in this manner would not violate the Sixth Amendment if the government established at an adversarial hearing that there was a likelihood that the jury would find the property in question to be the proceeds of the defendant's illegal drug activities; but those two judges concluded that Section 853(e)(1)(A) does not permit a district court to hold such a hearing. *Monsanto*, slip op. 4766-4768 (opinion of Miner, J.).<sup>2</sup>

The decision of the en banc Second Circuit in *Monsanto* squarely conflicts with the ruling by the Tenth Circuit in *United States v. Nichols*, 841 F.2d 1485 (1988), which sustained a pretrial restraining order that had the effect of preventing the defendant from using the restrained assets to pay his attorney. The decision in *Monsanto* also is in tension with the en banc decision of the Fourth Circuit in the instant case, which rejected statutory and constitutional claims that attorney's fees are exempt from forfeiture. For these reasons, and because questions concerning the application of the forfeiture statutes in this setting are important and recurring, we have filed a petition for a writ of certiorari to review the judgment of the en banc Second Circuit in *Monsanto*.

<sup>2</sup> Judges Mahoney, Cardamone, Pierce, and Pratt each filed a separate dissenting opinion (slip op. 4769-4790).

2. In *Kiser*, the Eighth Circuit did not resolve the question whether the Sixth Amendment would absolutely bar the forfeiture of assets that the defendant wishes to use to pay an attorney. The panel instead held that the property in question, which had been restrained in parallel civil forfeiture proceedings, must be transferred to defense counsel, because the government had not established at an adversarial hearing that there was a likelihood that the property would be found by the jury in the criminal prosecution to be forfeited to the United States. The panel further held that the property would thereafter be exempt from forfeiture even if the defendant is ultimately convicted.<sup>3</sup>

3. As we explain in the petition for a writ of certiorari in *Monsanto*,<sup>4</sup> in light of these recent developments, we believe that the statutory and constitutional questions arising from the application of the forfeiture statutes to assets that are used (or to be used) to pay an attorney warrant review by this Court. We urge the Court to grant the petition in *Monsanto* because of the square conflict between the Second Circuit's decision in that case and the Tenth Circuit's decision in *Nichols* concerning the circumstances

<sup>3</sup> On September 16, 1988, the United States filed a petition for rehearing, with suggestion for rehearing en banc, in *Kiser*. In that petition, we requested the en banc court either to address the question whether the Sixth Amendment absolutely bars application of the forfeiture statutes in this setting, or at least to remand the case to the district court in order to afford the government an opportunity to make the showing that the panel had held to be required, since that issue had not been raised in the district court. In the event the court was not prepared to grant that relief, however, we asked the en banc court to hold the rehearing petition and to dispose of it in light of this Court's disposition of the petition for a writ of certiorari in *Monsanto*.

<sup>4</sup> We have furnished petitioner Caplin & Drysdale with a copy of the certiorari petition in *Monsanto*.

in which a district court may enter a pre-conviction restraining order that has the effect of preventing the defendant from transferring assets to a lawyer in payment of attorney's fees.

By contrast, although the district court also entered a pre-conviction restraining order in this case, defendant Reckmeyer pleaded guilty before the district court ruled on his motion to vacate that order, and he accordingly had no occasion to appeal it. Nor was the restraining order subject to review by the Fourth Circuit on the government's appeal of the district court's order granting petitioner Caplin & Drysdale's application for payment of its attorneys' fees out of the forfeited estate. The instant case therefore does not present the Court with an occasion to consider questions concerning the propriety of and the procedural prerequisites to the issuance of restraining orders in this setting. Moreover, because petitioner Caplin & Drysdale chose to remain as counsel for defendant Reckmeyer despite the risk that it would not be paid, this case does not present an occasion for the Court to consider the constitutionality of Section 853 where it actually has had the effect of deterring the defendant's counsel of choice from representing him in the prosecution. For these reasons, we do not believe that this case would be a suitable vehicle, standing alone, for resolution of several of the important constitutional and statutory issues that have arisen in this general area. We therefore have asked the Court to review the Second Circuit's decision in *Monsanto* to address those issues.

At the same time, however, we believe that the instant case would be a good companion to *Monsanto*, and we therefore urge the Court to grant the petition in this case as well and to consolidate it with *Monsanto* for purposes of oral argument. *Monsanto* involves a pre-conviction challenge by the defendant to a restraining order that has

the effect of temporarily barring the defendant from transferring assets to his attorney, while this case involves a *post*-conviction motion by *counsel* to receive payment of their fees out of assets that already have been finally determined by the district court to be the illegal proceeds of (or otherwise associated with) the defendant's illegal drug activities. In our view, the Court's consideration of the full range of statutory and constitutional issues that have arisen in the lower courts would be assisted by having before it two cases that are in these different postures and involve parties who have somewhat different perspectives. We note as well that if the Court were to grant certiorari only in *Monsanto* and then affirm the judgment of the Second Circuit on grounds that pertain only to the issuance of a pretrial restraining order, the Court's decision would not control this case. Although we argue in *Monsanto* that the judgment of the Second Circuit should be reversed—a disposition that, *a fortiori*, would establish the correctness of the Fourth Circuit's judgment in this case—the possibility that the Court could find the differences between the two cases to be significant for purposes of statutory or constitutional analysis leads us to conclude that it would be appropriate for the Court to grant review in both.<sup>5</sup>

<sup>5</sup> The decision of the en banc Fourth Circuit in this case conflicts with *United States v. Jones*, 837 F.2d 1332 (5th Cir. 1988), which held that defense counsel may recover fees out of assets that have already been declared forfeited to the United States. However, as we have pointed out (Br. in Opp. 9 & n.7), the Fifth Circuit has granted the government's petition for rehearing en banc in *Jones*. Oral argument on rehearing en banc in *Jones* was held on September 19, 1988.

For the foregoing reasons, the petition for a writ of certiorari should be granted and the case should be consolidated for purposes of oral argument with *United States v. Monsanto*, petition for cert. pending, No.88-454 (filed Sept. 14, 1988).

Respectfully submitted:

CHARLES FRIED  
Solicitor General

SEPTEMBER 1988